

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MAUREEN LAUER	:	CIVIL ACTION
	:	
Plaintiff	:	NO. 02-8585
	:	
v.	:	
	:	
JO ANNE BARNHART,	:	
Commissioner of	:	
Social Security,	:	
	:	
Defendant	:	

Padova, J.

MEMORANDUM

January __, 2004

Plaintiff Maureen Lauer seeks judicial review of the decision of Defendant, Social Security Commissioner Jo Anne Barnhart, which denied her claim for Social Security Disability (DIB) benefits. Both Plaintiff and Defendant have filed motions for summary judgment. Pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72.1(d)(1)(C), the Court referred this matter to Magistrate Judge Linda K. Caracappa for a Report and Recommendation. Magistrate Judge Caracappa recommended that Plaintiff's motion for summary judgment be denied, and that Defendant's motion for summary judgment be granted. Plaintiff filed timely objections to the Report and Recommendation. For the reasons which follow, the Court overrules Plaintiff's objections and grant's Defendant's motion for summary judgment in its entirety.

I. FACTUAL HISTORY

Plaintiff is a forty-two year-old female born on December 22, 1960 (Tr. 38). She has a high school education, and past work experience as a cashier, secretary, bank clerk, and payroll assistant (Tr. 40-41). Disability is alleged as of February 7, 1991, when she injured her back at work lifting a box (Tr. 173). Plaintiff's last date insured for DIB was September 30, 1992, and thus, in order to be entitled to such benefits, she must establish disability on or prior to this date. 20 C.F.R. § 404.131 (a).

Plaintiff's application for DIB was denied both initially and upon reconsideration (Tr. 130-136). She then requested a hearing before an Administrative Law Judge (ALJ). A hearing was held on February 12, 1999, at which Plaintiff, represented by counsel, testified. Also testifying were a vocational expert, a medical expert, and a witness, her husband (Tr. 34-127). In a decision dated April 28, 1999, the ALJ determined that Plaintiff "has the following severe impairment which causes more than minimal restrictions upon claimant's ability to work: a severe back impairment (herniated lumbar disc)." (Tr. 25). The ALJ further determined that plaintiff, during the period before her date last insured (September 30, 1992), retained the residual functional capacity to perform her past work as a secretary and payroll clerk

(Tr. 26).¹ Thus, the ALJ determined that Plaintiff was not entitled to benefits (Tr. 26-27).

The ALJ's findings became the final decision of the Commissioner when the Appeals Council denied plaintiff's request for review on September 26, 2002. (Tr. 5-6).

II. MEDICAL HISTORY

The relevant evidence in this case consists of medical reports and testimony which are summarized as follows:

Plaintiff was evaluated by an orthopedic surgeon, Dr. Joseph Shatouhy, on September 10, 1991. Dr. Shatouhy diagnosed Plaintiff with "lumbar sprain syndrome superimposed on lumbar degenerative disc disease without any disc herniation." (Tr. 425.) Dr. Shatouhy opined that Plaintiff could return to her job, provided she did not lift objects over 25 pounds and did not sit, stand or walk for more than two hours at a time. (Tr. 425-26.)

Dr. Philip Spinuzza evaluated Plaintiff on July 10, 1991, and noted that Plaintiff had continued pain in the low back that was aggravated by bending, twisting, lifting and sitting for prolonged periods of time. (Tr. 267.) Dr. Spinuzza saw Plaintiff again on November 6, 1991. On this date, Dr. Spinuzza noted that Plaintiff

¹ The ALJ also found that Plaintiff's condition significantly deteriorated subsequent to Plaintiff's date last insured. The ALJ further found that, as of November 1996, but not before, Plaintiff was disabled within the meaning of the social security regulations. (Tr. 26.) However, because this date was nearly four years after Plaintiff's date last insured, the ALJ found that Plaintiff was not entitled to benefits. (Tr. 27.)

had a normal gait and was taking no medication, but advised her to consider an epidural steroid injection. (Tr. 264.) A doctor from the Philadelphia Orthopedic group² reported on June 24, 1992 that Plaintiff had a sitting tolerance of 30 minutes maximum, and had difficulty riding in a car or sitting at home for longer periods than that. (Tr. 257.) This doctor further noted that Plaintiff had a normal gait and was neurologically intact. (Id.) This doctor recommended an exercise program. (Id.)

On August 26, 1992, Dr. George Avetian dismissed Plaintiff from active treatment and advised Plaintiff that she should avoid prolonged sitting, standing, lifting, twisting, forward bending and exercising. (Tr. 249-50.) Dr. Avetian further found that Plaintiff was "partially disabled with regard to daily living activities as defined by the AMA." (Id.)

Plaintiff was given a functional capacity evaluation at Ridley Sports Therapy on September 3, 1992. Plaintiff was found to have a functional capacity somewhere between light and sedentary work. (Tr. 355-57). The report further found that Plaintiff "exhibit[ed] tendencies toward symptom magnification and inappropriate illness behavior." (Id.)

Dr. Spinuzza saw Plaintiff again on October 21, 1992. Dr. Spinuzza found that Plaintiff's sitting tolerance was 30 minutes,

²This document is not signed, and there is no indication on the document of the name of the doctor who completed the evaluation.

and recommended that Plaintiff continue her exercises. (Tr. 413.) Dr. Spinuzza also opined that, because of Plaintiff's 30 minute sitting tolerance, it would be very difficult for her to return to her past job as a secretary. (Tr. 413.)

In February 1997, Plaintiff came under the care of an orthopedic surgeon, Dr. Richard Levenberg. Dr. Levenberg found that plaintiff had suffered a rapid deterioration of her neurological function in November, 1996. (Tr. 487-89.) Dr. Levenberg performed a laminectomy on February 24, 1997. (Id.)

Plaintiff testified at the administrative hearing that her condition had progressively worsened over the years. (Tr. 40-49). Plaintiff used a cane at the hearing, but testified that she only began to use this cane after her surgery in February, 1997. (Tr. 39). Plaintiff testified that she was able to drive a car in 1991, but that her tolerance for sitting in the vehicle was only approximately 25 minutes. (Id.)

A Dr. Askin testified as a medical expert at the hearing. Dr. Askin opined that Plaintiff's back impairment met the severity of a listed impairment as of November, 1996, but further found that Plaintiff was capable of performing a restricted range of work before this date. (Tr. 90-102.)

A vocational expert also testified at the hearing. The vocational expert found, based upon the hypothetical presented by the ALJ, that Plaintiff could perform her past work as a secretary

and payroll clerk. (Tr. 106-08.)

III. STANDARD OF REVIEW

Under the Social Security Act, a claimant is disabled if he is unable to engage in "any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to . . . last for a continuous period of not less than twelve (12) months." 42 U.S.C. §423(d)(1)(A); 20 C.F.R. §404.1505. Under the medical-vocational regulations, as promulgated by the Commissioner, the Commissioner uses a five-step sequential evaluation to evaluate disability claims.³ The burden to prove the

³The five steps are:

1. If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.
2. You must have a severe impairment. If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not now have a severe impairment.
3. If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.
4. Your impairment(s) must prevent you from doing past relevant work. If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.
5. Your impairment(s) must prevent you from doing any

existence of a disability rests initially upon the claimant. 42 U.S.C. §423(d)(5). To satisfy this burden, the claimant must show an inability to return to his former work. Once the claimant makes this showing, the burden of proof then shifts to the Commissioner to show that the claimant, given his age, education and work experience, has the ability to perform specific jobs that exist in the economy. Rossi v. Califano, 602 F.2d 55, 57 (3d Cir. 1979).

Judicial review of the Commissioner's final decision is limited, and this Court is bound by the factual findings of the Commissioner if they are supported by substantial evidence and decided according to correct legal standards. Allen v. Brown, 881 F.2d 37, 39 (3d Cir. 1989); Coria v. Heckler, 750 F.2d 245, 247 (3d Cir. 1984). "Substantial evidence" is deemed to be such relevant evidence as a reasonable mind might accept as adequate to support a decision. Richardson v. Perales, 402 U.S. 389, 407 (1971); Cotter v. Harris, 642 F.2d 700, 704 (3d Cir. 1981). Substantial evidence is more than a mere scintilla, but may be somewhat less than a preponderance. Dobrowolsky v. Califano, 606 F.2d 403, 406

other work. (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled. (2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can no longer do this kind of work, we use a different rule.
20 C.F.R. §§ 404.1520(b)-(f).

(3d Cir. 1979).

Despite the deference to administrative decisions implied by this standard, this Court retains the responsibility to scrutinize the entire record and to reverse or remand if the Commissioner's decision is not supported by substantial evidence. Smith v. Califano, 637 F.2d 968, 970 (3d Cir. 1981). Substantial evidence can only be considered as supporting evidence in relationship to all other evidence in the record. Kent v. Schweiker, 701 F.2d 110, 114 (3d Cir. 1983).

IV. DISCUSSION

Plaintiff argues that the ALJ's decision in this case failed to accord adequate weight to the findings of her physicians that she was unable to work before her date last insured, and was therefore not based upon substantial evidence.

After examining the record, the ALJ found that only one of the physicians who examined Plaintiff, Dr. Levenberg, opined that Plaintiff was disabled under the Social Security regulations before her date last insured. Specifically, Dr. Levenberg testified at his deposition that, based upon his examinations of Plaintiff beginning in 1997, and based upon his review of Plaintiff's records of prior treatment, he could state with a reasonable degree of medical certainty that Plaintiff was unable to work from the date of her injury (Tr. 588.) Dr. Levenberg appeared to base this opinion on his belief that, given Plaintiff's medical history, any

attempt on her part to engage in even sedentary or light work would have caused her condition to rapidly deteriorate. (Tr. 588.) However, Dr. Levenberg failed in his testimony to explain why he believed that Plaintiff's condition would necessarily have deteriorated. Moreover, it is not disputed that Dr. Levenberg did not begin treating Plaintiff until February, 1997, over four years after Plaintiff's date last insured. Furthermore, there is a substantial amount of evidence in the record demonstrating that Plaintiff's back condition worsened significantly in 1996. Specifically, a report by Dr. Levenberg dated February 21, 1997 states that Plaintiff "did fairly well" until November 1996, when she suffered a severe deterioration of her condition, requiring surgery. (Tr. 487-89.) Dr. Levenberg also testified at the hearing that Plaintiff's condition worsened over time. Furthermore, Dr. Askin, a medical expert at the administrative hearing, testified that Dr. Levenberg's opinion that Plaintiff could not have engaged in substantial gainful activity before her date last insured was "highly speculative." (Tr. 68-69.)

The ALJ further found that, in contrast to Dr. Levenberg, none of the physicians who did examine Plaintiff during the period before her date last insured ever determined that the limitations caused by her condition left Plaintiff entirely unable to work. The administrative record fully supports the ALJ's finding in this regard. Indeed, Plaintiff's neurological condition and resulting

limitations as described by these examining physicians are not consistent with a finding that Plaintiff was disabled during the relevant period within the meaning of the Social Security regulations. A functional capacity evaluation performed on September 3, 1992, within one month of Plaintiff's date last insured, indicated that Plaintiff fell between "the categories for sedentary work and light work as defined by the Dictionary for Occupational Titles put out by the United States Department of Labor." (Tr. 357.) The evaluation notes further state that

the results of this functional capacity evaluation may not be indicative of [Plaintiff's] true capacities as the results of the questionnaires tend to indicate that [Plaintiff] may be exhibiting inappropriate illness behavior or symptom magnification.

(Id.) Similarly, Dr. Shatouhy, after an examination conducted on September 10, 1991, stated that Plaintiff had the capability to return to her job, with the restriction that she should not be allowed to sit, stand or walk for more than two hours at a time and should not be allowed to lift more than 25 pounds. (Tr. 603.) After a subsequent evaluation conducted on August 6, 1992, Dr. Shatouhy again stated that Plaintiff could return to "working activity," provided that she wore a protective brace and avoided lifting more than 25 pounds. (Tr. 604.) Dr. Spinuzza, after an examination conducted on August 7, 1991, stated that Plaintiff was "neurologically intact" with a normal gait pattern. (Tr. 420.) Dr. Spinuzza also stated at this time that Plaintiff had pain in her

left side and buttocks while sitting, and therefore had a sitting tolerance of up to 30 minutes. (Id.) Nearly three years later, in July, 1994, Dr. Spinuzza, after examining Plaintiff, filled out a physical capacity checklist in which he indicated that Plaintiff could work part time for four hours per day. (Tr. 428.)⁴ On September 14, 1995, Dr. Sachs, after examining Plaintiff, stated that "the patient can do a sedentary type of job." (Tr. 235.)

None of these physicians, nor any other physician in the record besides Dr. Levenberg, ever stated that Plaintiff was totally disabled or unable to engage in any substantial gainful activity. Furthermore, no physician in the record besides Dr. Levenberg ever stated that Plaintiff's condition would have deteriorated rapidly had she attempted to return to work during the period before her date last insured. Accordingly, upon review of the record, the Court finds that the ALJ's decision to reject Dr. Levenberg's conclusion that Plaintiff was disabled during the relevant time period was reasonable and based upon substantial evidence.

⁴ Plaintiff argues that Dr. Spinuzza's opinion that Plaintiff was capable of only part time work is inconsistent with the ALJ's finding that Plaintiff was not disabled, because claimants "ordinarily must be able to work full time in order to be found not disabled." (Pl's Mot. Summ. J. at 19.) However, the Social Security Regulations clearly state that a person who can work only on a part time basis may still be capable of substantial gainful activity, depending upon their income level. (20 CFR 404.1572.) The ALJ found that, based upon Plaintiff reported full time salary, her part time earnings (working four hours per day) would still be sufficient for a finding of substantial gainful activity. (Tr. 21.)

Plaintiff argues that, because Dr. Levenberg was Plaintiff's treating physician, his opinion should have been accorded greater weight than the opinion of Dr. Askin, a non-treating physician who examined Plaintiff's medical records and testified as a medical expert at the administrative hearing. A treating physician's opinion regarding the nature and severity of a claimant's impairment is generally entitled to greater weight than a non-treating physician's opinion, and, where the opinion is not contradicted by other substantial evidence in the record, it will be given controlling weight. Fargnoli v. Massanari, 247 F.3d 34, 43 (3d Cir. 2001). The rationale behind this rule is that a treating physician is generally in the best position to obtain a detailed picture of a claimant's condition over time. Id.

As discussed, *supra*, Dr. Levenberg did not begin treating Plaintiff until February, 1997, and thus was not Plaintiff's treating physician during the period before September, 1992, the period relevant to the disability determination in this case. Thus, the Court sees no basis for considering Dr. Levenberg a treating physician for the purpose of determining the nature and extent of Plaintiff's disability during the relevant period. Furthermore, as the ALJ noted, Dr. Levenberg's opinion was inconsistent not only with Dr. Askin's opinion, but also with other evidence in the record, including, *inter alia*, the residual functional capacity examination conducted in September, 1992 and

the opinions of doctors who did treat or examine Plaintiff.

Plaintiff further argues that the medical opinions of Drs. Spinuzza and Shatouhy, who both indicate that Plaintiff could only sit for limited periods of time during an eight hour day, are inconsistent with the ALJ's finding that Plaintiff was capable of performing her past work as a secretary and payroll clerk. However, a vocational expert who testified at the hearing noted that both these positions allow, and in many cases require, an employee to periodically stand and walk around. (Tr. 107.) Thus, the ALJ's finding in this regard was based upon substantial evidence.

Plaintiff further argues that the ALJ failed to properly evaluate Plaintiff's subjective complaints of the pain she experienced during the period before her date last insured. "An ALJ must give serious consideration to a claimant's subjective complaints of pain, even where those complaints are not supported by objective evidence Where medical evidence does support a claimant's complaints of pain, the complaints should then be given great weight and may not be disregarded unless there exists contrary medical evidence." Mason v. Shalala, 994 F.2d 1058, 1067-68 (3d Cir. 1993)(citations omitted). Thus, where the ALJ does not fully accept a Plaintiff's testimony concerning pain experienced, the ALJ is obligated to explain her reasoning. See id. Where the claimant has a condition which could reasonably

produce the pain alleged, but the pain that the claimant complains of exceeds the level and intensity that is supported by objective medical evidence, the ALJ must consider the following five factors: (1) the individual's daily activities; (2) the location, duration, frequency, and intensity of the individual's pain or other symptoms; (3) factors that precipitate and aggravate the symptoms; (4) the type, dosage, effectiveness and side effects of any medication taken by the individual; (5) treatment, other than medication that the individual receives or has received for relief of pain or other symptoms; and (6) any measure other than treatment that the individual uses or has used to relieve pain or other symptoms. See Social Security Ruling 96-7p, 20 C.F.R. §§ 404.1529(c)(3)(i)-(vii).

The ALJ fully credited Plaintiff's testimony that she was in considerable pain on the date of the hearing. However, the ALJ found that Plaintiff's testimony was not fully credible with respect to the level of pain she experienced during the period before her date last insured. Specifically, the ALJ found that Plaintiff's testimony concerning the level of pain she experienced and her ability to work before September 30, 2002, was "not accepted by me to the extent those statements allege a level of disabling symptoms which exceed what the objective medical evidence and clinical findings could reasonably be expected to produce." (Tr. 19.) The ALJ based her finding upon Plaintiff's medical

history, the reports from Plaintiff's physicians and the claimant's own description of her activities and lifestyle. (Tr. 19.)

The record supports the ALJ's rejection of Plaintiff's testimony concerning the level of pain that she experienced. First, as the ALJ discussed, while the reports from Plaintiff's treating physicians during the period before September 30, 1992 indicate that Plaintiff experienced some amount of pain, none of these reports indicate that plaintiff experienced pain at a level and intensity that prevented her from performing substantial gainful activity. Second, Plaintiff's husband testified that Plaintiff was able during this period to drive short distances, as well as go to the movies on occasion, although it was somewhat uncomfortable for her to do so. (Tr. 60.) Because the ALJ addressed Plaintiff's subjective complaints of pain and stated her reasons for rejecting them, and because the ALJ's conclusion is supported by the record, the ALJ had the discretion to reject Plaintiff's complaints of disabling pain. Capoferri v. Harris, 501 F. Supp. 32, 37 (E.D. Pa. 1980).

V. CONCLUSION

For the foregoing reasons, the Court overrules Plaintiff's objections to the Report and Recommendation of Magistrate Judge Caracappa. Defendant's Motion for Summary Judgment is granted in its entirety. Plaintiff's Motion for Summary Judgment is denied in its entirety.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MAUREEN LAUER	:	CIVIL ACTION
	:	
Plaintiff	:	NO. 02-8585
	:	
v.	:	
	:	
JO ANNE BARNHART,	:	
Commissioner of	:	
Social Security,	:	
	:	
Defendant	:	

ORDER

AND NOW, this ___ day of January, 2004, having considered the parties' motions for summary judgment, and having reviewed the entire record, including the ALJ's written Decision, the transcript of the hearing, and the hearing exhibits, for the reasons discussed in the accompanying Memorandum, **IT IS HEREBY ORDERED AS FOLLOWS:**

- 1) Plaintiff's objections to the Report and Recommendation of Magistrate Judge Caracappa are overruled;
- 2) Defendant's Motion for Summary Judgment is **GRANTED**;
- 3) Plaintiff's Motion for Summary Judgment is **DENIED**;
- 4) This case shall be closed for statistical purposes.

BY THE COURT:

John R. Padova, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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Commissioner of	:	
Social Security,	:	
	:	
Defendant	:	

JUDGMENT

AND NOW, this ___ day of January, 2004, in accordance with the Court's separate Order dated this same date, granting Defendant's Motion for Summary Judgment, pursuant to Kadelski v. Sullivan, 30 F.3d 399 (3d Cir. 1994) and Federal Rule of Civil Procedure 58, **IT IS HEREBY ORDERED** that **JUDGMENT IS ENTERED** in favor of Defendant, Jo Anne Barnhart, Commissioner of the Social Security Administration, and against Plaintiff, Maureen Lauer.

BY THE COURT:

John R. Padova, J.